IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term A. D. 1953

No. ——

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION and CITY OF TACOMA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DON EASTVOLD,
Attorney General,

WILLIAM E. HICKS,
Special Assistant Attorney General,

LEE OLWELL,
Special Assistant Attorney General,

HAROLD A. PEBBLES,
Special Assistant Attorney General,

Attorneys for the State of Washington.

STEPHEN J. MORRISSEY,
Attorney for Petitioner Washington State Sportsmen's Council, Inc.

Office and Postoffice Address: 306 Vance Bldg., Seattle, Washington.

INDEX

		Page
I.	Summary Statement of Matter Involved	5
II.	The Basis Upon Which This Court Has Jurisdiction	12
III.	The Questions Involved	13
IV.	Specification of Errors to Be Urged	15
V.	Reasons Relied on for the Allowance of the Writ	17
	Appendix 1	37
	Appendix 2	39

STATUTES

Chapter 9, Laws of Washington, 1949, RCW 75.20.010 ..... 7, 31

Chapter 112, Section 46, Laws of Washington, 1949, RCW 75.20.050 8

Chapter 112, Section 49, Laws of Washington, 1949, RCW 75.20.100 8

RCW 90.20.010 31

RCW 90.24.070 31

Federal Power Act, 16 U. S. C. 791a to 825r ... 7, 24

Section 6, 16 U. S. C. 799 25

Section 9(b), 16 U. S. C. 802 15

Section 10(c), 16 U. S. C. 803 25

Section 21, 16 U. S. C. 814 25

Section 27, 16 U. S. C. 821 ..... 15, 24, 25, 26, 28, 29, 30, 31

Section 313(b), 16 U. S. C. 825(1) 12, 17

28 U. S. C. 347 (Judicial Code 240) 17

28 U. S. C. 1254(1) (2) (62 Stats. 928) 12

Fifth Amendment, United States Constitution 31, 32

TEXT BOOKS AND MISCELLANEOUS

Page

Congressional Record, Vol. 51, Page 13630..... 28

Review Report on Columbia River and Tributaries 19

House Document 531..... 21

Vol. 11, Ten Rivers in America's Future..... 22

TABLE OF CASES

Alabama Power Co. v. Gulf Power Co., 283 F. 606 29

Allen-Bradley Local, etc. v. Wisconsin Employment Retirement Board, 315 U. S. 740..... 24

Bacon v. Walker, 204 U. S. 311..... 27

Carey v. South Dakota, 250 U. S. 118..... 24

City of Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199..... 31

Currin v. Wallace, 306 U. S. 1..... 32

First Iowa Hydroelectric Co-operative v. Federal Power Commission, 328 U. S. 152..... ..... 11, 12, 23, 27, 28, 29

Ford and Son v. Little Falls Fibre Co., 280 U. S. 369 .....12, 25

Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359..... 26

H. P. Welch Co. v. New Hampshire, 306 U. S. 79 24

In re Slaughterhouse Cases, 83 U. S. 36..... 27

International Union U. A. W. v. Wisconsin Employment Retirement Board, 336 U. S. 245.. 24

Lake Shore & M. S. Ry. Co. v. State of Ohio, 173 U. S. 285..... 27

TABLE OF CASES— *Continued*

Page

Niagara-Mohawk Power Corp. v. Federal Power Commission, 202 F. (2d) 190, Cert. granted 345 U. S. 955 ..... 17, 32, 33, 34

Pregg v. Commonwealth of Pennsylvania, 41 U. S. 539 27

Reid v. Colorado, 187 U. S. 137 25

Rice v. Santa Fe Elevator Corp., 331 U. S. 218 .. 24

State of Washington Dept. of Game v. Federal Power Commission, 207 F. (2d) 391 ..... 7, 12

Steward Machine Company v. Davis, 301 U. S. 548 32

U. S. v. Appalachian Electric Light Co., 311 U. S. 377 12

United States v. Gerlach Live Stock Co., 339 U. S. 725 26

U. S. v. Petrillo, 68 F. Supp. 845 (reversed on other grounds, 332 U. S. 1) 32

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term A. D. 1954

No. ——

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION and CITY OF TACOMA, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioners respectfully show:

I

SUMMARY STATEMENT OF MATTER INVOLVED

The State of Washington and its departments of Game and of Fisheries are charged with the duty of

enforcing the laws, rules and regulations of such state relative to conservation of food fish and game fish.

The Washington State Sportsmen's Council, Inc. is a non-profit corporation of the state and is dedicated to the preservation and protection of the natural resources of the State of Washington.

The City of Tacoma is a municipal corporation of the State of Washington.

The City of Tacoma filed application on December 28, 1948, (later supplemented) for a license under the Federal Power Act to construct and operate a proposed hydroelectric development, designated as Project Number 2016, to be located on the Cowlitz River in Lewis County, Washington.

The two aforesaid Washington State Departments and the Washington State Sportsmen's Council, Inc. became parties to the proceeding by an order of the Federal Power Commission permitting intervention.

Following public hearings, submission of testimony, exhibits and briefs. a recommended decision by the presiding examiner, exceptions filed thereto, and oral argument, the findings and basic order now under review were issued by the Federal Power Commission on November 28, 1951.

After denial of rehearing by said Commission, and within the time prescribed by statute, a petition for review was filed in the Court of Appeals for the Ninth Circuit. On October 5, 1953, the Court of

Appeals rendered a decision (207 F. (2d) 391) sustaining the Commission and its Order, and in so doing, held in effect that the statutes of the State of Washington relative to conservation of its natural resources were repugnant to the laws of the United States, to-wit, the Federal Power Act, 16 U. S. C. 791 *et seq.*, and therefore must fall.

The above mentioned project proposed by the City of Tacoma would consist of two dams on the Cowlitz River, one at Mossyrock and the other at Mayfield, together with appurtenant reservoirs, generating facilities, and alleged fish protective facilities.

The Mossyrock Dam, located at river mile 65, would rise 325 feet above tailwater and its reservoir would extend some 21 miles upstream.

The Mayfield Dam, located at river mile 52, would rise 185 feet above tailwater and its reservoir would extend upstream to the tailwater of the Mossyrock Dam, a distance of about 13½ miles.

Both of these dams are situated within the migratory range of the anadromous fish that utilize the Cowlitz River, and their construction is expressly prohibited by the State Statute (Chapter 9, Laws of 1949; RCW 75.20.010; Appx. 1 to this brief), commonly called the Sanctuary Act, which makes fish sanctuaries out of the Cowlitz River and other lower Columbia River tributaries and prohibits the construction of dams over 25 feet in height

on such rivers within the migratory range of anadromous fish.

The City of Tacoma has not obtained a hydraulic permit from the state for the construction of the dams and the right to use the water of the river as required by the state law (Secs. 46 and 49, Chap. 112, Laws of 1949; RCW 75.20.050 and 75.20.100; Appx. 2 to this brief).

It has likewise failed to obtain the approval of the Director of Fisheries and the Director of Game of the State of Washington for its proposed fish protective facilities in connection with the dams as required by the above cited state laws.

The Cowlitz River drains the western slope of the Cascade Range from Mount Rainier south to Mount Adams and Mount St. Helens, all in southwestern Washington. From its headwaters in the glaciers of Mt. Rainier the river flows generally southwest a distance of 67.7 miles to its junction with the Columbia River at Longview, Washington. The entire river and all of its watershed are wholly within the State of Washington.

The watershed of the Cowlitz is in a remote and isolated part of the state. Except for some areas which have been logged, almost all of the watershed remains in a natural, primitive condition. The watershed is almost entirely devoid of industrial development, and the river and its tributaries have but few diversions for agricultural or domestic purposes. The flow of the river system is largely the same as it

was prior to the advent of the white man's civilization. This fact, together with the temperature, food content and chemical qualities of the water, make the river system an ideal environment for the propagation of anadromous fish (Tr. 2929-2932, Ex. 30, p. 1).

The Cowlitz River is the most important producer of fish in the lower Columbia River system (below Bonneville Dam) and in the entire Columbia basin is exceeded in this respect only by the Snake River (Tr. 2932, 2388, Ex. 30, p. 1).

The principal species of fish produced in the waters of the Cowlitz are spring Chinook salmon, fall Chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt.

The gross annual value of the salmon produced in the river has been conservatively placed at $2,000,000.00, with about half being produced above the Mayfield dam site and half below (Ex. 30, p. 2; Tr. 2854; Ex. 25, pp. 7-8).

The steelhead and cutthroat trout are not fished commercially but provide an important recreational fishery difficult to measure in a monetary manner, and which contributes greatly to "better living" in the area (Ex. 25, p. 5).

The smelt, whose annual commercial value has been as high as $300,000.00, spawn in the main river below Mayfield (Tr. 2972).

Most of the testimony before the Commission was devoted to the question of whether the proposed

fish facilities, or any fish facilities that might be proposed in view of the available knowledge on this subject, would be able to preserve the runs of fish not utilizing the river. The Petitioners, as interveners in the proceedings, produced 13 expert witnesses on this subject. They constituted a group of trained biologists and engineers who for years have worked in the salmon resource field and who, individually, and as a group, have participated in the design of every major salmon protective facility in our country and Canada. They were of the opinion that there is no known method of maintaining productive runs of fish above these proposed dams. They were further of the opinion that the proposed dams would have a damaging effect on the runs of fish below the dams (Ex. 30, pp. 3-6; Tr. 2141, 2924, 2921, 3006, 3264, 3265).

The applicant (City) produced but one expert witness on this question. While his general background as a fishery biologist was broad, his experience with salmon was limited and his participation in the design of salmon protective facilities was nil. He, alone, among all the experts, held hope that the protective facilities could be made to work, but conceded that more experimentation was needed (Tr. 1692, 1693, 1697, 1698, 1699, 1700, 1703, 1704, 1705, 1710, 1722, 1725, 1727, 1731, 1737, 1738).

The order of the Commission likewise recognizes that the applicant failed to produce satisfactory

proof that its fish protective facilities would work, and provided for further experimentation.

Thus, it is apparent that the order of the commission, and the decision of the Court of Appeals upholding it, destroys, or at least places in serious jeopardy, a natural state resource with an annual value in excess of $2,000,000.00.

The Court of Appeals has misinterpreted and improperly applied the Federal Power Act and *First Iowa Hydroelectric Co-op v. Federal Power Comm.*, 328 U. S. 152, to nullify and hold inoperative the above mentioned state laws and permit construction of the project in question.

II

The Basis Upon Which This Court Has Jurisdiction to Review

The opinion of the Court of Appeals (Ninth Circuit) was entered and filed on October 5, 1953, and is reported in 207 F. (2d) 391. This Supreme Court has jurisdiction to review such decision under the provisions of law as contained in 28 U. S. C. 1254 (1) (2) (62 Stats. 928) and 16 U. S. C. 825(l) (49 Stats. 860).

Cases sustaining jurisdiction of this Supreme Court are: *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152; *U. S. v. Appalachian Electric Light Co.*, 311 U. S. 377; *Ford and Son v. Little Falls Fibre Co.*, 280 U. S. 369.

III

The Questions Involved

1. The State of Washington, by statute and in protection of its fishery resources, has prohibited the building of any dams in excess of 25 feet in height on the Cowlitz River. The Federal Power Commission, by its Order of November 28, 1951, has issued a license to the City of Tacoma to construct two dams on the Cowlitz River, in complete disregard of such state statute and without compliance with other applicable state laws. Does the Federal Power Act confer such authority upon the Commission, and are said state statutes superseded and rendered inoperative by the Federal Power Act?

2. Finding No. 59, of the Commission's Order of November 28, 1951, is that the proposed project is best adapted to a comprehensive plan for improving or developing the Cowlitz River. Is there substantial evidence to support such Finding?

3. The Federal Power Commission, in its Order of November 28, 1951, did not find that the construction of the proposed dams would be in the public interest without the inclusion of adequate fish protection devices. Articles 30 and 31 of said Order, however, make no adequate provision for the determination of the effectiveness of said devices, provide for the management of a state resource by the City of Tacoma to the exclusion of the sovereignty of the State of Washington, do not require the City of Ta-

coma to prove the effectiveness of the fish protective devices, direct issuance of the license and permit commencement of the construction of the dams before said effectiveness is determined, and provide for further essential proceedings without opportunity for Petitioners to be heard. Is such authority conferred upon the Federal Power Commission by the Federal Power Act?

IV

Specification of Errors to Be Urged

The Court of Appeals (Ninth Circuit) erred:

1. In holding that the state Sanctuary Act and other applicable laws of the State of Washington are inoperative and do not constitute a bar to the construction of these dams.

2. In holding that Finding number 53 of the Commission's Order of November 28, 1951, was supported by substantial evidence, and in failing to hold that said Finding number 53 was contrary to Section 9(b) and Section 27 of the Federal Power Act.

3. In failing to hold that the Commission's Order of November 28, 1951, constituted administrative legislation violative of the provisions of the Constitution and laws of the United States.

4. In holding that there was substantial evidence to support Finding number 59 of the Commission's Order of November 28, 1951, and in failing to hold that said Finding number 59 is in complete variance with and contradictory to Findings 36, 37, 38 and 39 of said Order.

5. In holding that there was substantial evidence to support the Commission's Findings and Con-

clusions contained in its Opinion and Order of November 28, 1951, that the proposed dams are necessary in the interest of national defense.

6. In failing to hold that the Federal Power Act did not confer upon the Federal Power Commission authority and discretion to disregard and destroy an important natural resource of the State of Washington, and in holding that the Federal Power Commission had not abused its discretion in regard thereto.

7. In failing to hold that the large and important runs of anadromous fish in the Cowlitz River would be substantially destroyed by the construction of these dams.

8. In failing to hold that Articles 30 and 31 of the Commission's Order of November 28, 1951, constitute an unlawful extension of the authority of the Commission; that said Articles make no adequate provision for the determination of the effectiveness of the fish protective devices; that said Articles provide for further essential proceedings without opportunity for Petitioners to be heard; and that said Articles are so indefinite and inadequate that Petitioners cannot be advised of their rights.

9. In affirming the Commission's Order of November 28, 1951.

V

Reasons Relied On For The Allowance of This Writ

1. The decision of the Court of Appeals renders inoperative state statutes enacted for the protection of a natural resource of the state and permits the destruction of that resource. It therefore involves a question of great substance and extreme general importance relating to the Constitution and laws of the United States. 2. It reaches that result on a misinterpretation and misapplication of the Federal Power Act and the decisions of this Court. 3. The decision below is in conflict with the ruling of the Court of Appeals for the District of Columbia in *Niagara-Mohawk Power Corporation v. Federal Power Commission*, 202 F. (2d) 190, Cert. granted 345 U. S. 955.

1. The decision of the Court of Appeals, insofar as it holds invalid the state Sanctuary Act and other related statutes of the State of Washington, would permit a direct appeal to this court (28 U. S. C. 347, Judicial Code 240), except for the limiting language in Section 313(b) of the Federal Power Act, 16 U. S. C. 825 (1)(b).

The pertinent state statutes in this proceeding (the Sanctuary Act, the Hydraulic Code, and the statutes relative to fish protective facilities) were passed by the state in the exercise of what is generally conceded to be the highest attribute of sover-

eignty—the protection of its natural resources under its police powers. The question to be determined is whether the Congress (if such power be invested in Congress) in the Federal Power Act conferred upon the Federal Power Commission authority to issue a license where the licensee is a municipality which has completely failed to comply with applicable state laws relative to the resources in question, and where the project itself is prohibited by state laws passed for the protection of the state's natural resources. There is therefore involved the question of whether the authority of a federal administrative agency, acting under the limited powers conferred upon it by Congress, supersedes the valid enactments of a state law passed for the protection of its natural resources. Since the question involves the power of a state to protect its resources as opposed to authority of a federal agency acting under statutory powers, the question is obviously one of general importance.

The issues to be determined in this case affect resources that are of substantial value to the Northwest and to the nation as a whole.

The monetary and recreational value of the Cowlitz as a producer of fish has been previously outlined, but to understand its importance in this respect it is necessary briefly to note some of the history of the Columbia River basin and the plans of private, state and federal agencies for its development.

Before the arrival of the white man in the northwest the entire Columbia River system, from its headwaters in Canada to its mouth, was extensively used for the propagation of anadromous fish, particularly salmon (Tr. 3595-3596; Ex. 43-A). However, civilization brought environmental changes such as divided watersheds, industrial pollution, irrigation diversions, and physical barriers such as dams, log jams, etc., that have made vast portions of the river system either unsuitable or inaccessible for anadromous fish. The Coulee Dam alone made inaccessible hundreds of miles of what were once excellent spawning grounds for salmon. The same result has been accomplished on a smaller scale by dams on tributary streams. It is presently estimated that when all dams now in construction, or authorized for construction, are completed, that more than 70% of the entire river system will be forever lost for fish propagation (Tr. 3597-3610, Ex. 43-6).

The preservation of a substantial part of the remaining fish populations in the Columbia River system has been a matter of great concern to the state and federal agencies responsible for planning the orderly development of the Columbia River basin, and after exhaustive study and analysis they have prepared a program which, if followed, will permit the development of all of the resources of the area without the sacrifice of any.

This plan is set forth in the "Review Report on Columbia River and Tributaries", prepared by the

Corps of Engineers, and officially noted in this matter. The report was submitted to the Secretary of Army on June 28, 1949, and was thereafter submitted to Congress.

Basically, the plan provides for the development of the upper river system for power, reclamation and related purposes and the preservation of the lower river system for the propagation of fish.

The plan is much too lengthy to review in detail. Suffice to say that it reviews in detail the potentialities of all the streams in the river systems and outlined the manner in which they might best be developed to serve the economy of the area (Tr. 93-102).

In this connection it is pertinent to note that the report outlines in detail the resources of the Cowlitz River system and specifically notices the power potential of the Mayfield and Mossyrock sites. However, the development of the river for power, flood control and navigation is not recommended because of the conflict with the fishery resources of the river (Tr. 99).

After agreement was effected between the Corps of Engineers and the Bureau of Reclamation, the plan was submitted for comment to various federal agencies, including the Federal Power Commission. On June 21, 1949, the Commission wrote the Chief of Engineers a letter in which it approved the plan as constituting a "desirable and coordinated basic framework for the comprehensive development and

utilization of the water resources of the Columbia River" (House Document 531, Tr. 98).

As a supplement to the comprehensive plan, the U. S. Fish & Wildlife Service developed the *Lower Columbia River Fisheries Plan.* This plan was officially noted by Chief of Engineers who recommended favorable consideration of the plan by Congress (Tr. 86-93).

The fisheries plan provides for increasing the fish producing potential of the Lower Columbia River streams, including the Cowlitz, by stream improvement, removal of barriers, hatcheries, abatement of pollution, screening of diversions, etc. (Tr. 88). Under the plan the actual work would be financed by federal funds and would be performed by the states of Oregon and Washington under the supervision of the U. S. Fish & Wildlife Service (Ex. 33).

While Congress has not formally approved this plan, it provided $1,000,000 in 1949, $1,100,000 in 1950, and $2,205,000 in 1951, to carry out the program which contemplates the expenditure of $20,000,000 over a ten year period (Ex. 30, p. 1).

The wholehearted endorsement by the State of Washington of the comprehensive plan and the fisheries plan is evidenced by the action of its legislature, which in 1949 passed what is commonly referred to as the "Sanctuary Act", which is fully set out in Appx. 1. The law, in effect, makes fish sanctuaries

out of the tributaries of the Lower Columbia River, including the Cowlitz, and prohibits the construction of structures in the rivers over 25 feet in height. There is no dispute that the terms of the Act prohibit the construction of the dams in question.

Another independent agency has studied and reported on the problem of best utilizing the water resources of the Columbia basin. The President's Water Resources Policy Commission discusses the Columbia at length in Volume 11, "Ten Rivers in America's Future". The problem of the Cowlitz is specifically mentioned (Tr. 189-195). The view of the President's Commission can be best summarized by stating that they agree with the opinion of the Corps of Engineers that the greatest good will be accomplished by preserving the integrity of the Lower Columbia River Fishing Plan by deferring multi-purpose development of sanctuary streams (including Cowlitz) until the power requirements of the future make necessary the development of the full power potential of the entire Columbia River system (Tr. 189-195).

While the U. S. Fish and Wildlife Service did not appear as a party in this controversy, two of its staff appeared and stated that their views and the material they presented represented the official view of the department and had been formally approved by the department's highest officials. One of these, Mr. Barnaby, in speaking of the Columbia River fisheries plan, stated, "The Cowlitz may be consid-

ered as a keystone of that program and nothing should be done that might diminish or jeopardize its present or potential productivity". (Ex. 30, p. 2.)

He was also of the opinion that the program might as well be abandoned if the dams are built.

The foregoing constitutes the policies determined by all interested agencies at the time the city's application was under consideration by the Federal Power Commission.

Thus it is apparent that the project which is authorized is in direct conflict with well considered official plans and policies for the development of the entire river basin with due regard for resources of all kinds. Further, the construction of such project as now authorized by the decision of the Court of Appeals will destroy or place in serious jeopardy an extremely valuable resource of the state.

Because of the substance and general importance of the issues here, and because the decision of the Court of Appeals erred in the particulars heretofore noted, it is in the general interest that these questions be resolved by this court.

2. The Court of Appeals based its decision herein upon *First Iowa Hydroelectric Co-op v. Federal Power Comm.*, 328 U. S. 152. We assert that the Court of Appeals has misinterpreted and misapplied both the Federal Power Act and the decisions of this court, particularly this court's decision in the *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152.

The Federal Power Act, 16 U. S. C. A. 791a to 825r, does not purport to destroy the natural resources of any state or to confer upon the Federal Power Commission such authority; but, on the contrary, the Act expressly withholds such authority from the Commission and unequivocally states the intention of the Congress to be that such resources shall be managed and controlled by the laws of the respective states.

Section 27 of the Federal Power Act is a saving clause reserving certain rights to the states as follows:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U. S. C. A. 821.

The several statutes of the State of Washington relating to uses of water and the protection of its fishery are clearly within the police power of the state. It is unquestioned law that the intention of Congress to exclude the states from the exercise of their police power must be clearly expressed and will not be implied. *International Union U. A. W. v. Wisconsin Employment Retirement Board*, 336 U. S. 245; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Allen-Bradley Local, etc., v. Wisconsin Employment Retirement Board*, 315 U. S. 740; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79; *Carey v.*

South Dakota, 250 U. S. 118; *Reid v. Colorado*, 187 U. S. 137.

The very language of the Federal Power Act negates any intention of Congress to exclude the states from the exercise of their police power, and, in fact, expresses an exactly contrary intention.

Upon three occasions this court has considered the intention of Congress as expressed in the Federal Power Act and in respect to the applicability of state laws.

In *Ford and Son v. Little Falls Fibre Co.*, 280 U. S. 369, this court said:

> "* * * The present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by State law, without compensation."

Citing cases, this court then referred to Sections 10(c), 27, 21 and 6 of the Act, and continued as follows:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from these laws may be subordinate to the power of the national government to regulate commerce upon them, they, nevertheless, so restrict the operation of the entire Act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration * * *."

One of the most recent decisions interpreting the Federal Power Act is the case of *Grand River*

Dam Authority v. Grand-Hydro, 335 U. S. 359, wherein this court said:

> "* * * As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the Court of Oklahoma in a condemnation action for the acquisition of land for power site purposes, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws."

In *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, one of the issues before this court involved the ascertainment of the intent of Congress, and the court referred specifically to a section of the Reclamation Act substantially similar to Section 27 of the Federal Power Act. The language of the court, included in a footnote, is as follows:

> "The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. Section 371 *et seq.*, 43 U. S. C. A. Section 371 *et seq.*, to which Congress adverted, applies only to the seventeen Western States. Section 8 provides: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof * * *' 43

U. S. C. A., Section 383. To the extent that it is applicable this clearly leaves it to the State to say what rights of an appropriator or reparian owner may subsist along with any federal right."

The *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152, did not decide that the Federal Power Act, stemming from the commerce clause of the United States Constitution, could take precedence over the inherent right of a state to preserve and protect its fish in public waters of the state. On the contrary, this court has, almost without exception, held that, except where repugnant to the U. S. Constitution, the police power of the states has never been conceded to the United States. *Pregg v. Commonwealth of Pennsylvania*, 41 U. S. 539; *In re Slaughterhouse Cases*, 83 U. S. 36; *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285; *Bacon v. Walker*, 204 U. S. 311.

In the *First Iowa* case, no question of the right of the state to legislate in protection of its natural resources was presented. The Iowa statute endowed the Executive Council of the state with the same power, the same duties and the same sphere of action as Congress has conferred upon the Federal Power Commission. To this extent, and to this extent alone, this court held that the licensee did not have to comply with the state laws.

In the case at bar the purpose and nature of the several state statutes are entirely different than any state laws considered in the *First Iowa* case. The

statutes of the State of Washington announce and set forth a state policy in respect to the diversion of water and the protection of its fishery resources, and it has been admitted by all parties that the City of Tacoma has failed to comply with the state laws and its proposed project is in direct violation thereof.

The question at this point is not whether Congress could so legislate as to preclude the operation and effectiveness of the state laws under consideration, but whether Congress has so legislated. It is our position that Congress has not delegated to the Federal Power Commission authority to override the several state statutes in question and, hence, permit the City of Tacoma to proceed in derogation of these state laws.

The conclusion above expressed is inescapable upon consideration of the entire Federal Power Act, including the sections previously set forth in this brief, and particularly is this true in relation to Section 27 of said Act.

In a footnote to the decision in the *First Iowa* case, this court refers to a Congressional debate upon the inclusion in another act of a section identical with Section 27. This reference, which appears in 51 Congressional Record 13630, is as follows:

> Mr. Mondell (Wyoming): "all that is asked of the Federal Government is to give those who seek to develop water power in the public land states an opportunity to use the public lands for that entirely legitimate and useful purpose . . .

> "Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public land states is a right received from the people of the state and not the Federal Government. The people of the commonwealth of the West are the owners and proprietors of all the water within their borders, and the only right that any individual can have or secure, at least in the majority of the public land states, is the right to use the water at a certain designated place for specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the western states that will carry with it the right to divert a drop of water or the use of a drop of water for the turning of a turbine. That right under the laws of the state, recognized by the Federal Constitution and the courts, must be secured from the people through the authority they have provided in the states. That right in all of the states is perpetual so long as the water shall be used at that place for that beneficial purpose."

Section 27 of the Act here in question refers to state laws relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses. Obviously, the specific words used do not in any way exhaust the general description since similar state laws may be invoked for many other purposes of the same general nature or character. This was expressly so held by the District Court in the case of *Alabama Power Company v. Gulf Power Co.*, 283 Fed. 606, which was cited with approval by this court in the *First Iowa* case.

The *Alabama Power Company* case refers specifically to other state laws within the same particular subject matter, as follows:

> "Section 27, in its specific enumerations does not exhaust the particular subject matter, since state laws may be invoked for the following purposes, to-wit, the construction of canals, or other artificial waterways, the construction of a drainage system, either to take fish from the navigable waters of the state, the rights of riparian owners with respect to the formation of ice on streams, the construction of wharfs, piers and docks, the right to shoot wild water fowls from boats under game laws, and perhaps others. These laws of the states are referred to and treated in the 27th volume of R. C. L., page 1061, along with the subjects of irrigation and municipal water supplies."

Each of the above types or classifications of state laws relates to legislation within the purview and scope of the police powers of the state as do laws relating to "irrigation" and "municipal uses." Each has to do with subjects, the regulation of which is a fundamental part of the sovereignty of the state and are of the *same nature* within the principle of *ejusdem generis.*

Certainly, upon principle and upon authority, the statutes of the State of Washington, set forth earlier in this brief, are laws relating to the control, appropriation, use or distribution of water within the phrase "other uses" as contained in Section 27 of the Federal Power Act and in complete accord with the principle of *ejusdem generis.*

Furthermore, both the state Sanctuary Act, RCW 75.20.010, and the state Water Code, RCW 90.20.010 to 90.24.070, relate or refer to dams for power purposes. It is too well settled to require extensive citation of authority that the construction of power dams is a proper municipal purpose or power. *The City of Tacoma v. Nisqually Power Company*, 57 Wash. 420, 107 Pac. 199.

These state laws, therefore, relate directly and unequivocally to the control, appropriation, use or distribution of water used for municipal uses. Hence, they are squarely within the protection of Section 27 of the Federal Power Act.

Finally, an analysis of the Federal Power Act as a whole, and the sections earlier set forth in particular, indicates clearly that Congress intended to accord to the several states the protection guaranteed them by the Fifth Amendment to the Constitution of the United States.

Respondent (City) has not shown, nor could it show, that there are no other sources of power which would supply that expected to be produced by the Cowlitz dams. Hence, these particular dams are not even claimed to be essential to the well being of the City of Tacoma. Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of the Cowlitz fishery and to take for its own use the

property of the state. This certainly amounts to a gross discrimination against the people of the state and such has been held to constitute a deprivation of property without due process, contrary to the Fifth Amendment. *Steward Machine Company v. Davis*, 301 U. S. 548; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Petrillo*, 68 F. Supp. 845 (reversed on other grounds, 332 U. S. 1).

The Federal Power Act, therefore, would be contrary to the Fifth Amendment if the court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the state and without compensation therefor.

3. The decision below is in conflict with *Niagara-Mohawk Power Corporation v. Federal Power Commission*, 202 F. (2d) 190, Cert. granted 345 U. S. 955.

The decision held that state water-use rights remain valid and compensable when encompassed in a federal licensed hydro-electric project, and that the federal license is not the source of water rights, but a permission to exercise them pursuant to state law. The Court of Appeals did not deny the long accepted proposition that Congress may exercise absolute power over the improvement of navigable streams. It held, however, that such authority was not necessarily exercised in the Federal Power Act.

In the opinion issued by the Court of Appeals, D. C. Circuit, in the *Niagara-Mohawk Power Corpo-*

ration v. Federal Power Commission case, the court stated, at page 207:

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the New River case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

At page 208, the said court stated further:

> "We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; * * * that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; *that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law*; * * *"

In the case at bar, Respondent, the City of Tacoma, has failed to comply with applicable laws of the State of Washington and the project is prohibited by the state Sanctuary Act. Consequently, the action of the court below, in affirming the ruling of the Federal Power Commission, and in holding that the several state statutes are inoperative, and hence not a bar to the issuance of the license, is squarely opposed to the ruling of the Court of Appeals for the District of Columbia in the *Niagara-Mohawk Case, supra.*

This court has granted certiorari in the *Niagara-Mohawk Case,* 345 U. S. 955, and the same reasons that prompted this court to review the decision in the *Niagara-Mohawk Case* equally require a review of the decision in the present case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Ninth Circuit had in the case numbered and entitled on its docket, No. 13289, State of Washington Department of Game; State of Washington Department of Fisheries; and Washington State Sportsmen's Council, Inc., a corporation, Petitioners v. Federal Power Commission, Respondent, and City of Tacoma, Intervener, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the

judgment herein of said Court of Appeals for the Ninth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated December 21, 1953.

DON EASTVOLD,
Attorney General,

WILLIAM E. HICKS,
Special Assistant Attorney General,

LEE OLWELL,
Special Assistant Attorney General,

HAROLD A. PEBBLES,
Special Assistant Attorney General,

Attorneys for the State of Washington.

STEPHEN J. MORRISSEY,
Attorney for Petitioner Washington State Sportsmen's Council, Inc.

APPENDIX 1

COLUMBIA RIVER FISH SANCTUARY

AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided*, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation,

upon the concurrent order of the Director of Fisheries and Director of Game.

SEC. 2. It shall be the duty of the Director of Fisheries and the Director of Game, to acquire and abate any dam or other obstruction, or to acquire any water-right which may have become vested on any streams or rivers tributary to the Columbia River downstream from McNary Dam which may be in conflict with the provisions of section 1 herein. Any condemnation action necessary under the provisions of this act shall be instituted under the provisions of chapter 120, Laws of 1947, and in the manner provided for the acquisition of property for public use of the state.

SEC. 3. The provisions of this act shall not apply to the waters of the North Fork of the Lewis River, nor the White Salmon River (Big White Salmon River).

SEC. 4. This act is necessary for the immediate support of the government of the State of Washington and its existing public institutions, and shall take effect April 1, 1949.

Passed the Senate February 9, 1949.

Passed the House February 8, 1949.

Approved by the Governor February 14, 1949.

(Chapter 9, Laws of 1949; RCW 75.20.010.)

APPENDIX 2

FISHERIES CODE

AN ACT establishing a Fisheries Code for the preservation, protection, perpetuation and management of food fish and shellfish; providing for and creating a Department of Fisheries; regulating the taking and possession of food fish and shellfish; licensing appliances therefor; providing for license fees and charges; licensing all phases of the fishing industry; providing for the acquisition of land and rights in land; providing for the construction, maintenance and operation of fish hatcheries, rearing stations, laboratories, nurseries and other installations; providing for the appointment of a Director of Fisheries and designating his authority; providing for the propagation, protection and disposition of oyster beds in the State of Washington; regulating the entire food fish and shellfish industry of the state and offshore waters; repealing certain statutes; fixing penalties for the violation of this act, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

* * *

SEC. 46. It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic

permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

* * *

SEC. 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first pro-

viding plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications.

* * *

Passed the Senate March 10, 1949.
Passed the House March 10, 1949.
Approved by the Governor March 16, 1949.

(Secs. 46 and 49, Chapter 112, Laws of 1949; RCW 75.20.050 and 75.20.100.)

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	11
Conclusion	20
Appendix A	21
Appendix B	23

Cases:

CITATIONS

Chapman v. *Federal Power Commission*, 345 U.S. 153	17, 18
First Iowa Coop. v. *Federal Power Commission*, 328 U.S. 152	10, 11, 12, 13, 14
Ford & Son v. *Little Falls Fibre Co.*, 280 U.S. 369	15
Grand River Dam Authority v. *Grand-Hydro*, 335 U.S. 359	15
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U.S. 82	13
McCready v. *Virginia*, 94 U.S. 391	13
Montana Power Co. v. *Federal Power Commission*, 112 F. 2d 371	19
Morris v. *Jones*, 329 U.S. 545	16
National Labor Relations Board v. *Link-Belt Co.*, 311 U.S. 584	19
National Labor Relations Board v. *Stowe Spinning Co.*, 336 U.S. 226	19
Niagara Falls Power Co. v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U.S. 792	18
Niagara Mohawk Power Corporation v. *Federal Power Commission*, 202 F. 2d 190, pending on a writ of certiorari, No. 28 this term	15
State of Iowa v. *Federal Power Commission*, 178 F. 2d 421, certiorari denied, 339 U.S. 979	19
United States v. *Appalachian Power Co.*, 311 U.S. 377	12
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725	15

Statutes:

Federal Power Act, 41 Stat. 1063, 49 Stat. 838, 16 U.S.C. 791a et seq.:	
Sec. 4(e)	3, 21
Sec. 10(a)	21
Sec. 23(b)	3, 22
Sec. 27	13

Statutes—Continued

Page

Columbia River Fish Sanctuary Act, Chapter 9, State of of Washington Laws of 1949, Revised Code of Washington 75.20.010:

Sec. 1 ..... 5, 23

Washington Fisheries Code, Chapter 112, State of Washington Laws of 1949, Revised Code of Washington 75.20.050, 75.20.100:

Sec. 46 ..... 5, 24
Sec. 49 ..... 5, 25

Miscellaneous:

Review Report on Columbia River and Tributaries (1948) (H. Doc. No. 531, 81st Cong. 2d Sess.) 6

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 514

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; AND WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., A CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION AND CITY OF TACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND CITY OF TACOMA IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. X 4397-4413) [1] is reported at 207 F. 2d 391. The opinion and order of the Federal Power Commission (R. II 522-561) is reported at 92 PUR (N. S.) 79.

[1] The roman numeral following the "R." in the references to the record indicates the volume of the printed transcript.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1953 (R. X 4414). The petition for a writ of certiorari was filed on December 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

1. Whether the Federal Power Act requires an applicant for a license for a hydroelectric project to comply with various State laws designed to conserve fishery resources in the river involved.

2. Whether the Commission properly concluded that the hydroelectric development on the Cowlitz River, as proposed by the City of Tacoma and modified in the license granted by the Commission, is best adapted to a comprehensive plan of development in light of a potential loss of fishery resources.

STATUTES INVOLVED

1. The pertinent provisions of the Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U. S. C. 791a *et seq.*) are set out in Appendix A, *infra,* pp. 21-23.

2. The pertinent provisions of the Columbia River Fish Sanctuary Act (Chapter 9, State of Washington Laws of 1949, Revised Code of Washington 75.20.010) and of the Washington Fisheries Code (Chapter 112, State of Washington Laws of 1949, Revised Code of Washington 75.20.050, 75.20.100) are set out in Appendix B, *infra,* pp. 23-27.

STATEMENT

On December 28, 1948, the City of Tacoma, a municipal corporation in the State of Washington (R. II 551), applied to the Federal Power Commission for a license under Section 4(e) of the Federal Power Act, App. A, *infra* p. 21, to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River, in Washington[2] (R. II 537-538). The proposed project, with an initial installation of 345,000 kilowatts,[3] was to consist of two developments: (1) the Mossyrock development, to be located about 65 miles upstream from the mouth of the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a power house with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity (R. II 539, 553-554; IX 4104-4106); (2) the Mayfield development, to be located about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending

[2] The Commission had earlier determined that the proposed project would affect lands of the United States, the navigable capacity of the Cowlitz River, and the interests of interstate and foreign commerce, and so under Section 23(b) of the Federal Power Act (App. A, *infra*, pp. 22-23) it could not be undertaken without the license (R. II 538-539).

[3] The City has an application pending before the Commission to install a fourth unit in each plant initially instead of at a later time, thereby increasing the initial installation to 460,000 kilowatts.

up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity (R. II 539, 554; IX 4106-4107). In the initial installation, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours.To protect the anadromous fish which use the River extensively for spawning,[4] the applicant also proposed a fish ladder system, or trapping and hauling facilities, or both methods, if necessary, to pass the fish upstream; a system of passageways and chambers to pass the adult fish and the fingerlings downstream; and the construction and operation of extensive fish hatchery facilities for artificial propagation of fish and development of fingerlings capable of making the migration to sea (R. II 532-535).

Petitioners (a private corporation and two agencies of the State of Washington) intervened in the proceedings held by the Commission to determine whether a license should issue.[5] They opposed the

---

[4] Anadromous fish are fish which go up rivers for the purpose of spawning and propagation. The Cowlitz River is used for spawning by spring chinook salmon, fall chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt. The gross annual value of the salmon has been about $2,000,000, one half of which is attributable to the areas below the Mayfield dam and one half above Mayfield (R. II 549). The trout are not fished commercially and the smelt whose annual commercial value has been as high as $300,000, spawn in the main river below Mayfield.

[5] That there was no unanimity within the State as to the licensing of the Cowlitz Project is indicated by the fact that the Attorney General of the State appointed a special Assistant

granting of a license on the grounds (1) that the proposed project violated laws of the State of Washington;[6] (2) it would not be best adapted to the comprehensive development of the Cowlitz River in that the fish conservation facilities and the protective measures proposed by the City would not be effective, the project would jeopardize or destroy the valuable fishery resources of the River, and the project would conflict with a comprehensive plan for the Columbia River Basin, including the Lower Columbia River Fishery Plan.[7]

Attorney General to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus the State of Washington by its Attorney General and the people of Washington holding views opposed to the State's departmental position were represented at the hearings before the Federal Power Commission.

[6] Specifically petitioners contended that the City had failed to comply with statutes of the State of Washington, enacted after the filing of the application, in that:

1. Both of the proposed dams would exceed the 25-foot height limitation imposed by the Columbia River Fish Sanctuary Act (Ch. 9, State of Washington Laws of 1949, App. B, *infra*, pp. 23-24) on the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from McNary Dam and within the migratory range of anadromous fish.
2. The City had not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112 Section 46, State of Washington Laws of 1949, App. B, *infra*, pp. 24-25.
3. Tacoma had not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams, as required by Ch. 112, Section 49, State of Washington Laws of 1949, App. B, *infra*, pp. 25-27.

[7] The Plan, in addition to proposing to improve fish runs on the Columbia River by the removal of obstructions to the passage of fish, by the abatement of pollution, and by other means, recommended utilizing the Cowlitz River as a spawning

Following extensive hearings, a recommended decision by the Presiding Examiner proposed denial of the license (R. I 170-1; X 4399-4400). Exceptions were filed to the recommended decision (R. I. 225-456) and, after oral argument thereon, the Commission, on November 28, 1951, filed its opinion, findings of fact and order granting the license with special conditions directed at minimizing the loss of fish life (R. II 522-561).

In its order, the Commission found that the project would provide substantial flood control benefits by reducing the flood of record (should it re-occur) from 140,000 cfs at Castle Rock, Washington to 70,000 cfs (bank full capacity) (R. II 540, 546); that it would provide direct and increasingly useful navigation benefits by increasing by at least six inches the navigable depths over the River's shoals (R. II 540, 546); and that since the proposed reservoirs will be easily accessible by a state highway, they would offer substantial recreational opportunities to people from local and distant areas (R. II 540).

In addition, the Commission found that the project would assist greatly in alleviating the acute

---

area for fish (R. II 527). It was prepared by the Fish and Wildlife Service of the Department of the Interior in cooperation with fish and game agencies of the States of Washington, Oregon and Idaho (R. II 527, X 4399, fn. 3). It was submitted to the Congress by the Army Corps of Engineers in its 1948 *Review Report on Columbia River and Tributaries* (H. Doc. No. 531, 81st Cong., 2d Sess.) (R. II 527.) Congress has not approved or adopted the overall plan but has appropriated funds for certain of the developments included therein (R. II 527).

power shortage in the Northwest Region, which it estimated, would continue for almost a decade (R. II 543-544), that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 per cent to the present capacity of Tacoma's generating plants and nearly ten per cent to the combined total installation in the Pacific Northwest power pool), location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle and Portland)[8] and the characteristics of its power output (the diversity of stream flow, caused by the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest Power Pool) (R. II 542-545). The Commission also found that none of the projects suggested for construction in lieu of the Cowlitz Project, could be constructed as quickly or as economically as this project (R. II 545).

As to the effect of the project on the fish life, the Commission found that although there were several problems in connection with the fish ladder system requiring biological and engineering study before adoption of a final design, the present data were sufficiently promising to warrant not rejecting the ladder system and that the alternative method of trapping and hauling upstream migrants past the

[8] The Cowlitz power would displace power now flowing from the eastern portion of the Bonneville system with resulting reduction in transmission line losses (R. II 544-545).

dams should produce reasonably satisfactory results (R. II 548); and that while it was not clear whether certain features of the proposed facilities for passing downstream migrants would be adequate to prevent excessive losses, it should be possible with proper testing and experimentation to provide facilities which would prevent undue losses (R. II 548-549).[9]

Finally, the Commission found that based on a two percent interest rate the annual value of the Cowlitz power would exceed its annual cost of production by at least $1,700,000 (R. II 546). On the other hand, since the construction of the project would not have any substantial adverse effect on the fishery resources below the Mayfield site and might even improve it, the fish life loss would be limited to that above Mayfield, and even if none of these fish were saved by the project's protective facilities, this annual net loss of about $600,000 plus the $610,000 annual cost of the protective facilities, would result in overall annual net benefits of about $500,000 exclusive of those from navigation and flood control (R. II 549-551). Based on these considerations, the Commission found that the project was

[9] As special conditions of the license, the Commission required that additional studies, test and experiments as to the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed (R. II 559-560).

best adapted to a comprehensive plan for development of the Cowlitz River (R. II 552).

In its opinion, the Commission refused to require the applicant to comply with the provisions of the Washington statutes, since "a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit" (R. II 526). As to the Lower Columbia River Fishery Plan, the Commission noted that not only had Congress not adopted or approved the overall plan, but that the Commission's recommendation in regard thereto (limited to the power features) had been based on the now invalid assumption that the power supply of Tacoma and the area was adequate (R. II 527-528) and further that the project was not inconsistent with the Plan in that both contemplated extensive expenditures for fish hatcheries and related facilities (R. II 533). Finally, after discussing the project's effect upon fish life and the various problems still to be solved in regard thereto, the Commission concluded (R. II 536-537):

> * * * Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.
>
> We are required to consider all of the possible advantages and disadvantages of the City's

> proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values.
> * * *

Following the Commission's denial of their petition for rehearing (R. II 460-522, 579-582),[10] petitioners sought review in the court below, which affirmed the Commission's order (R. II 686-698; X 4397-4413). The court held that this Court's decision in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, was dispositive of petitioners' contention that unless Tacoma complied with the State laws the Commission had no authority to issue a license (R. X 4405-4408). It further ruled that

[10] In its opinion denying rehearing, the Commission made it clear that when the plans for fishery facilities were submitted for approval the Washington State conservation agencies would be consulted and be given every opportunity to furnish any evidence material and relevant to these plans (R. II 581-582).

the Commission's findings as to the necessity of the project to alleviate the power shortage, as to the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, and as to the Cowlitz Project being best adapted to a comprehensive plan for developing the River, were supported by substantial evidence, not an abuse of discretion, and conclusive (R. X 4409-4412). It, accordingly, concluded that there was "ample evidence to sustain the Commission in the exercise of its judgment that the Cowlitz Project is 'best adapted to a comprehensive plan for improving or developing a waterway [*i.e.*, the Cowlitz River] * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes' " (R. X 4412-4413).

ARGUMENT

In this Court, petitioners do not contend that the Commission was without jurisdiction to authorize the construction of hydroelectric projects on the Cowlitz River. See *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152, 163. Rather, they appear to rely on the same grounds which they urged without success upon the Commission and the court below. The Court of Appeals correctly rejected these contentions and held properly instead that the Commission's order granting the license was supported by substantial evidence and was in accordance with the applicable decisions of this Court. Accordingly, there is no warrant for review by this Court.

1. As the court below held (R. X 4405-4408), this Court's decision in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, is dispositive of petitioner's claim that the Washington statutes limiting the construction of hydroelectric projects on the Cowlitz River operate to restrict the Commission's licensing authority under the Federal Power Act. See, also *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 404, 405, 426-427. In *First Iowa,* as here, there was a direct conflict between the project authorized by the Commission and the statutes of the State involved, in that Iowa law undertook to prohibit the type of development licensed by the Commission. This Court, in rejecting Iowa's contention that the State law operated as a limitation upon the Commission's licensing authority, expressly held that nothing in the Federal Power Act required compliance with a conflicting local law as a condition precedent to the issuance of a federal license. See 328 U.S. at 162 *et seq.* For example, the Court stated (328 U.S. at 162, 164, 181):

> * * * The Commission would have been justified in following its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.
>
> * * * * *

> To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.
>
> * * * * *
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *

Petitioners urge that *First Iowa* is distinguishable principally on the ground that the Washington statutes relate "to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses" which, *First Iowa* recognized, were saved by Section 27 of the Power Act (Pet. p. 29; Appendix A, *infra,* p. 23).[11] This dis-

[11] Petitioners also claim that the fact that the Washington statutes are directed at protecting fish life further distinguishes *First Iowa* and renders it inapplicable. It is settled, however, that the authority of the States to protect fish life in navigable waters, like all other aspects of State authority in regard to these waters, is subordinate to the Federal Government's paramount right of navigation. See, *e.g., McCready* v. *Virginia,* 94 U.S. 391, 394-395; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. 82,

tinction, however, has no substance since there can be no doubt that the Washington statutes were concerned solely with regulatory controls over the waters of the Cowlitz River. Not only were the Iowa laws which were held superseded in *First Iowa* of a similar regulatory nature, but this Court in *First Iowa* plainly read Section 27 as only saving state laws relating to certain types of proprietary rights (328 U.S. at 175-176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be in the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.

Moreover, contrary to petitioners' contention (Pet. 17, 32-34), there is no conflict as to the scope of Section 27 between the holding below and *Niagara Mohawk Power Corporation* v. *Federal Power Commission,* 202 F. 2d 190 (C.A. D.C.), pending on writ of certiorari, No. 28, this Term. The rights under State law sought to be asserted in *Niagara Mohawk* do not relate to regulation of the use of the waters of the Niagara River, as is the case here, but rather were certain usufructary rights allegedly valid under State law to generate power with these waters. And while the Court of Appeals ruled that such rights are saved from supersedure by Section 27, it expressly recognized (202 F. 2d at 207):

> [W]hen state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case.[12]

Plainly, therefore, far from being in conflict, the decision below is fully consistent with *Niagara Mohawk.*[13]

---

[12] While the Commission accepts this reading of Section 27, it goes further and takes the position that the alleged usufructary rights there involved are likewise outside the scope of Section 27. See Brief for Federal Power Commission in No. 28, this Term.

[13] *Ford and Son* v. *Little Falls Fibre Co.*, 280 U.S. 369; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359 and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, cited by petitioners (Pet. pp. 25-26), have no bearing here if only for the reason that they all involve proprietary rights. In addition, it is to be noted that in *Grand River*, this Court expressly

2. There is ample support for the Commission's conclusion that the project is best adapted to a comprehensive plan of development of the Columbia River system. Petitioners attempt to give their attack on this finding a semblance of validity by focusing upon the potential loss of fishery resources. But apart from the facts that the loss will probably not be nearly so extensive as urged by petitioners and that the Commission was anxious that the loss be minimized and directed that the best possible facilities for achieving that goal be devised,[14] it is important to remember that fishery resources were not the sole element considered by the Commission in arriving at its conclusion. On the contrary, it is only one of the several factors weighed by the Commission in arriving at its conclusion in a complex and difficult situation. As pointed out *supra,* pp. 6-10, the Commission found that the

---

refrained from passing on the scope of Section 27 (335 U.S. at 373-375) and further that *Gerlach* involved the saving of state rights under the Reclamation Acts, not the Federal Power Act.

Also the decision of this Court in *Morris* v. *Jones,* 329 U.S. 545, holding that where, as here, the state and federal statutes cannot be reconciled or consistently stand together, the action of a state even under its police power must give way, clearly disposes of the petitioners' contentions to the contrary (Pet. 24-25, 27).

[14] The Commission has gone to exceptional lengths to see that the fisheries resources of the Cowlitz are protected to the fullest extent possible, requiring an initial investment of $9,400,000 and annual expenditures of around $610,000 for this purpose together with close cooperation between the City of Tacoma and the State and Federal fishery agencies (R. II 550-559). The State agency has already been in correspondence with the City and Commission in furtherance of this objective, and has been and will be afforded every opportunity to assist in protecting these important fishery resources.

project would furnish substantial flood control, navigation and recreation benefits. It also found that the project would be an exceptionally valuable addition to the Northwest Region power supply and would assist greatly in alleviating the power shortage in the area, and further that even if no fish life above the Mayfield site were saved, the power benefits alone would more than offset the resulting fishery loss. It was only after balancing these benefits against the possible fish loss that the Commission concluded that the license should issue.

Petitioners again contend (Pet. 19-23) that the Commission's findings that the Cowlitz project is best adapted to a comprehensive plan of development is contrary to the comprehensive plan of the lower Columbia River basin and the Columbia River Fishery Plan. The Commission gave full consideration in its opinion and order to this contention (R. II 527-529, 547-548), and set forth fully the reasons why, in its judgment, it was in the public interest to grant the license.

Congress has never approved or adopted the overall plan although it has appropriated money for particular facilities included therein (R. II 527, 547-548) and in the absence of such adoption or approval, there is no statutory restriction upon the Commission's jurisdiction. Cf. *Chapman* v. *Federal Power Commission,* 345 U. S. 153. Moreover, although the Commission and the Army Engineers may have approved the Plan in 1948, the Commission at least limited its approval to the power fea-

tures, and both the Commission and the Engineers predicated their recommendation on the assumption that the power supply was otherwise adequate (R. I 408; II 527-529). Inasmuch as the situation has now changed and the existing power facilities are inadequate to satisfy the demand, there is no reason why the 1948 Plan should be binding upon the Commission, particularly since the Plan itself is still being revised and must of necessity be kept flexible in order to meet changing conditions. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787, 792 (C. A. 2), certiorari denied, 320 U. S. 792.

In these circumstances, there is no basis for upsetting the Commission's conclusion, particularly since the resolution of these conflicting factors is committed to the expert judgment of the Federal Power Commission by Section 10(a) of the Power Act (App. A, *infra,* pp. 21-22). As stated in *Chapman* v. *Federal Power Commission,* 345 U. S. 153, where this Court affirmed the Commission's grant of a license for a project on the Roanoke River (345 U. S. at 171):

> Subordinate arguments are made, bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power

> to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason.

See, also, *Montana Power Company* v. *Federal Power Commission,* 112 F. 2d 371, 374 (C. A. 9); *State of Iowa* v. *Federal Power Commission,* 178 F. 2d 421, 427 (C. A. 8), certiorari denied, 339 U. S. 979; cf. *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 231; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 597.

CONCLUSION

The order of the Commission, affirmed by the court below, is supported by adequate evidence and is in accordance with law. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General;
WARREN E. BURGER,
Assistant Attorney General;
MELVIN RICHTER,
LESTER S. JAYSON,
Attorneys.

WILLARD W. GATCHELL,
General Counsel;
JOHN C. MASON,
LOUIS C. KAPLAN,
Attorneys,
FEDERAL POWER COMMISSION.
CLARENCE M. BOYLE,
Corporation Counsel,
DEAN BARLINE,
Ass't Corporation Counsel,
E. K. MURRAY,
Special Counsel,
City of Tacoma.

FEBRUARY 1954.

APPENDIX A

The Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) provides in pertinent part:

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such

as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 23 * * *

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which

Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

APPENDIX B

1. The Columbia River Fish Sanctuary Act (Chapter 9, State of Washington Laws of 1949,

Revised Code of Washington 75.20.010) provides in pertinent part:

> SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided,* That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game.

2. The Washington Fisheries Code (Chapter 112, State of Washington Laws of 1949, Revised Code of Washington 75.20.050, 75.20.100) provides in pertinent part:

SEC. 46. It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

* * * * *

SECTION 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or

government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fish life in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction of any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 207339 889